# In the Supreme Court of the United States

OCTOBER TERM, 1972

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**No. 72-444**

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MISSOURI PACIFIC RAILROAD COMPANY,
A Missouri Corporation,
*Petitioner,*

vs.

WILLIAM A. SMITH CONTRACTING COMPANY, INC.,
A Missouri Corporation,
*Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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### OPINION BELOW

The opinion of the Missouri Court of Appeals, Kansas City District, filed April 3, 1972, is reported as William A. Smith Contracting Company, Inc. vs. Missouri Pacific Railroad Company, 481 S.W.2d 580. That Court reversed the decision of the Circuit Court of Jackson County, Missouri, and remanded the case with directions to enter judgment for the plaintiff, respondent herein in the amount of $7,599.02. The Missouri Court of Appeals, Kansas City District held that the defendant was a common carrier within the purview of the Interstate Commerce Act, that it was under a duty to accept for shipment plaintiff's contractor's equipment; that defendant had control of the shipment when it was damaged and that under all of the

facts, defendant was acting as a common carrier and not pursuant to a "special engagement", hence the Carmack-Cummins Amendment applied and the defendant's attempt to limit its liability for negligence was void.

## QUESTION PRESENTED

Was the defendant engaged in the performance of its ordinary duties as a common carrier at the time it accepted plaintiff's shipment to the construction site so as to be subject to the Carmack-Cummins Amendment, 49 U. S. C. A., Section 20, Paragraph 11, which declares invalid in such circumstances contracts exempting the carrier from liability; or was the shipment accepted as a "special engagement" of the defendant acting in some capacity other than that of a common carrier, which would not subject it to the restrictions of the Interstate Commerce Act, and the Carmack-Cummins Amendment?

## STATUTORY PROVISIONS INVOLVED

Carmack-Cummins Amendment to the Interstate Commerce Act, 49 U. S. C. 20 (11). Copy is set out in Petitioner's Appendix 2, A7-A10.

## STATEMENT OF THE CASE

On or about July 2, 1966, plaintiff made a contract with defendant that plaintiff would construct main and auxiliary tracks and appurtenances and to rehabilitate the former southern branch line between Marlin and Waco, Texas, all owned by defendant. In the contract, defend-

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ant agreed to transport plaintiff's contractor's equipment to the construction site without transportation costs. This equipment was to be used by plaintiff solely for the purpose of performing the work required of it under the construction contract, which further provided that plaintiff would hold defendant free and harmless from all liability for damages to plaintiff's property from any cause including negligence of defendant's agents and employees. While en route from Kansas City, Kansas, to Waco, Texas, the contractor's equipment suffered damages, stipulated by the parties to be a total of $7,599.02. (Tr. 10, 11, 12)

The case was tried upon plaintiff's first amended petition for damages praying for damages by reason of defendant's breach of a contract of carriage and bill of lading concerning the contractor's equipment. (Tr. 2-6)

Defendant, Missouri Pacific Railroad denied in its answer that the Interstate Commerce Act applied to the shipment and alleged further the application of the hold harmless agreement contained in the contract. (Tr. 7-8) The facts were stipulated by the parties and submitted to the trial court and the judgment of the trial court was for the defendant and upon appeal to the Missouri Court of Appeals, Kansas City District that Court reversed and remanded the cause with directions to enter judgment for plaintiff in the amount of $7,599.02.

## REASONS FOR DENYING THE WRIT

**1. No conflict of decisions exists in the instant decision and applicable decisions of the Supreme Court of the United States.**

The well-reasoned decision of the Missouri Court of Appeals, Kansas City District is clearly in accord with

prior Federal decisions construing the Carmack-Cummins Amendment. 49 U. S. C. 20 (11). In addition, petitioner bases his entire reason for granting certiorari upon the 1913 case of *Santa Fe, Prescott, and Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U.S. 177, 33 S. Ct. 474, 57 L. Ed. 787; a case clearly distinguishable and inapplicable to the question presented herein. Respondent contends there is no conflict in the decision, but rather petitioner's argument is in conflict with the literal interpretation of the Carmack-Cummins Amendment. Finally, there is no important significant recurring problem as stated by petitioner since the Carmack-Cummins Amendment has since its inception rendered contractual attempts to limit liability for negligence void—a fact which carriers have been apprised of since the adoption of the Carmack-Cummins Amendment. Respondent contends that petitioner's writ of certiorari should be denied.

Petitioner relies principally upon the *Grant* case cited supra, and takes the position that despite its distinguishable features, it is controlling. In *Grant*, the railroad agreed, pursuant to a construction contract, at a reduced tariff rate from that accorded to the general public, to transport men and materials to and from the construction site and further, after it was completed, to a site where further grading was to be done by the contractor. The cars carrying the equipment were placed on a track in a desert without water, inhabitants, a station agent or fire apparatus. The cars were left without a watchman in charge and the contractor's property was lost by fire.

Most importantly, the railroad's agreement to carry the contractor's property was to be performed entirely within the state of Arizona, on an *intrastate shipment*. (Emphasis supplied) The *Grant* case is clearly distinguishable on this fact alone. Of greater importance, it

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was decided before Congress declared the public policy of the nation by the Carmack-Cummins Amendment of 1915, providing that any common carrier, railroad, or transportation company transporting property in *interstate commerce* (emphasis supplied) may not relieve itself of liability by contract. The Interstate Commerce Act, 49 U. S. C. A. Section 20 (11) codified the common law with respect to the liability of a common carrier, railroad, or transportation company for damage to a shipper's property, i.e., that such an entity is liable for the full actual loss, damage or injury caused by it unless it can show that the damage was caused by (a) an act of God, (b) a public enemy, (c) the act of the shipper himself, (d) public authority or (e) the inherent vice or nature of the goods. *Missouri Pacific Railroad Company* v. *Elmoor and Stahl*, 377 U.S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194, 197; *Hamilton Manufacturing Company* v. *Chicago and Northwestern Railway Company*, (D.C. Wisc.) 176 Fed. Supp. 546, 548. There is no contention made that any of these exceptions apply.

The Missouri Court of Appeals, Kansas City District, in rendering its decision carefully reviewed the applicable Federal Law with respect to the question at hand and determined that there was no question but that the defendant was a common carrier within the purview of the Interstate Commerce Act; and further that as a common carrier, it was under a duty to accept for shipment the plaintiff's contractor's equipment. The Court stated, l.c. 583:

> "Under all the facts, it must be held that defendant was acting as a common carrier and not pursuant to a 'special engagement' under its contract with plaintiff that the latter perform construction work for defendant on its property. The Carmack-Cummins Amend-

ment, supra, applies, and thereunder defendant's attempt to limit its liability for negligence is void. (Citing cases.)"

**2. No important significant recurring problem exists by virtue of the instant decision.**

Petitioner maintains that an important significant recurring problem has been raised by virtue of the decision rendered by the Missouri Court of Appeals, Kansas City District. Petitioner's contention is clearly without merit. The passage of the Carmack-Cummins Amendment of 1915 placed affected carriers on notice as to the legal effect of contractual attempts to limit their liability. The decision of the Missouri Court of Appeals, Kansas City District simply affirmed the interpretation of the Carmack-Cummins Amendment previously rendered by countless decisions since its passage. Respondent maintains that Congress has declared the public policy of the nation by the Carmack-Cummins Amendment of 1915 providing that a railroad carrying property from a point in one state to a point in another state may not relieve itself of liability by contract. Failure of petitioner to adhere to this policy cannot create a valid question for review by the Supreme Court of the United States.

**3. The liability of a railroad carrying property interstate is controlled by Section 20, Paragraph 11 of the Interstate Commerce Act.**

In reading the Carmack-Cummins Amendment, its provisions make specific reference to (1) any common carrier, (2) railroad, (3) or transportation company. It is submitted that this categorization is pertinent when construing the statutory language in light of specific factual situations. The very use of the three separate words

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is a clear indication that a railroad, apart from a common carrier or transportation company, when receiving property for interstate transportation is liable for damage and that no contract may exempt that railroad from such liability. Statutory rules of construction warrant this interpretation. See *Piet* v. *United States*, 176 Fed. Supp. 576 (1959); *In the matter of James W. Autry, Debtor*, 204 Fed. Supp. 820 (1962).

## CONCLUSION

Certiorari is clearly not warranted in the case at bar. The decision of the Missouri Court of Appeals, Kansas City District is no departure from established principles. It is an affirmation.

Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari to review the judgment and opinion of the Missouri Court of Appeals, Kansas City District.

Respectfully submitted,

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